No. 20, 274

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AERO SPACELINES, INC., a corporation,

Appellee.

BRIEF FOR THE APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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JURISDICTION

This action was brought by appellant to recover a civil penalty from appellee in the sum of $3,000.00 as provided by Section 901(a) of the Federal Aviation Act of 1958, as amended, by 49 U.S.C. 1471(a)(1), for three violations of Civil Air Regulation 45.2, 14 C.F.R. 45.2. Jurisdiction was conferred upon the District Court by Section 1007(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1487(b), and by Title 28, U.S.C. 1345.

Both appellant and appellee filed motions for summary

judgment, and on April 30, 1965 a judgment was entered by the United States District Court, Southern District of California, Central Division, in favor of appellee. Findings of Fact and Conclusions of Law were also filed on April 30, 1965. Appellant's Notice of Appeal was filed on June 23, 1965.

This court's jurisdiction rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This appeal involves the sole question of whether the aircraft here in question was a "public aircraft", as that term is defined in the Federal Aviation Act of 1958, as amended, [1/] thereby rendering the Federal Aviation Act inapplicable to the aircraft and the appellee (as owner-operator of the aircraft) not subject to the jurisdiction or control of the Federal Aviation Administrator (herein, Administrator).

Heretofore, the term "public aircraft" has never been interpreted by any court. Consequently, this is a case of first impression.

This action was commenced by appellant on October 14, 1964, by the filing of a complaint (T. 2-4) to recover a total civil penalty of $3,000 from appellee under Section 901(a) [2/] of the

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1/ 49 U.S.C., Sec. 1301(30)

2/ Title 49 U.S.C.A. 1471(a)(1) provides, in pertinent part, that:

"Any person who violates ... any provision of subchapter VI [Safety Regulations of Civil Aeronautics] ... of this chapter [Chapter 20, Federal Aviation (continued)

Federal Aviation Act of 1958, as amended, 49 U. S.C. 1471(a) for three violations of Section 45.2 of the Civil Air Regulations, 14 C. F. R. 45. 2. [3]

The three violations set forth in the complaint took place, respectively, on September 20, 1963, October 26, 1963, and October 30, 1963, and in each instance involved the operation by the appellee of the same Boeing B-377PG, civil aircraft N1024 V, in the carrying for compensation (for the National Aeronautics and Space Administration, herein, NASA) of very substantial tonnages from Air Force Bases in California to similar Federal installations in Florida and Alabama, while the appelle e did not hold a commercial operator certificate issued by the Administrator of the Federal Aviation Agency pursuant to Civil Air Regulation 45. 2. [4]

On March 18, 1965, both the Appellant (T. 8-25) and the

2/ (Cont'd) Program] or any rule, regulation, or order issued thereunder ... shall be subject to a civil penalty of not to exceed $1, 000 for each such violation."

3/ Civil Air Regulation 45. 2, 14 C.F. R. 45. 2 (Revised as of January 1, 1963) reads in pertinent part:

"No person subject to the provisions of this part [covering Commercial Operator Certification and Operation Rules] shall engage in air commerce using aircraft of more than 12, 500 pounds maximum certificated take-off weight until he has obtained from the Administrator a commercial operator certificate; . . .

4/ Supra.

appellee (T. 26-53) filed motions for summary judgment, along with a Stipulation of Facts and Issue (T. 54-68), wherein the following, undisputed facts were presented to the court:

The appellee, a California corporation, voluntarily undertook to redesign and modify a Boeing B-377 to meet the needs of the National Aeronautics and Space Administration and other governmental or private organizations in transporting large-sized cargo. The resulting aircraft, Boeing B-377PG, is the subject of this proceeding (T. 55, lines 11-15).

Until the appellee developed the aircraft, there did not exist any aircraft capable of handling and transporting extremely large cargo such as was used by NASA in the space program (T. 55, lines 16-19).

On May 16, 1963, the aircraft B-377PG was flown for the first time by the appellee in its modified form (T. 56, lines 5-6) and on May 28, 1963 appellee entered into a contract with NASA (T. 64).

This initial contract was to end July 31, 1963, subject to extension by NASA until August 31, 1963, covering a portion of the period during which tests of the aircraft were undertaken to determine if it was airworthy. Also, tests required by NASA were pursued to determine the feasibility of using such an aircraft to handle and transport spacecraft modules, missiles, components and related cargo (T. 56, lines 12-22).

On July 10, 1963, the Federal Aviation Agency (herein, FAA) issued a Certificate of Airworthiness for the aircraft

(T. 65), and on September 6, 1963 NASA and appellee entered into a contract for "Air Transportation Services" (T. 67) for the term September 1, 1963 through June 30, 1964. The three violations alleged in the complaint arose during this time when appellee operated the aircraft pursuant to its contract with NASA without obtaining a Commercial Operator Certificate from the Administrator.

On February 20, 1963 (before the contracts with NASA), appellee applied to the FAA for a Commercial Operator Certificate (T. 61) and, although it did not withdraw this application, at the times of the flights here in question the appellee notified the FAA that it was not required to secure a Commercial Operator Certificate because the aircraft was a "public aircraft" under the terms of the contract with NASA (T. 57, lines 26-32). During the same time, it was the stated position of the FAA and its Administrator that the operation of the aircraft required certification of appellee as a commercial operator under the appropriate regulations issued by the Administrator (T. 57, lines 21-26).

After the flights here in question, the appellee did obtain Commercial Operator Certificate No. WE 68(c) from the FAA effective November 13, 1963 (T. 58, lines 1-3).

Since completion of the modification and successful flight of Boeing B-377 PG to the date of the complaint herein, no movement of said aircraft was made except at the direction and for the use of NASA, exclusive of crew training or check flights of which the FAA was advised (T. 58, lines 23--27).

The Federal Aviation Act of 1958, as amended, 49 U.S.C.A. 1301, et seq., restricts the applicability of Part 45 of the Civil Air Regulations (Commercial Operator Certificate) to "civil aircraft" (T. 55, lines 3-5), thereby being inapplicable to "public aircraft."

The appellee has admitted operating the aircraft on the three specified dates without a Commercial Operator Certificate (T. 57, line 15).

The appellee has also admitted that on each of the flights the aircraft weighed "more than 12,500 pounds maximum certificated take-off weight" (T. 7, lines 7 and 14), and, that the appellee is liable for the maximum civil penalty of $3,000.00 "if the aircraft is found not to be a public aircraft ..." (T. 57, lines 14-20).

Based upon the above-recited, undisputed facts, the following issue of law was presented to the District Court:

> Is the aircraft subject of this action a public aircraft as defined in the Federal Aviation Act by virtue of the provisions for its use under the contract with NASA and its use by that agency of the Federal Government? (T. 59, lines 4-8).

On April 30, 1965, the District Court entered judgment for appellee, decreeing "that at the times mentioned in the complaint defendant's aircraft B-377PG was a 'public aircraft' as that term is used in Section 101(30) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 1301(30), and,

accordingly, at such times the Federal Aviation Act was not applicable to said aircraft and defendant was not subject to the jurisdiction or control of the Federal Aviation Administrator" (T. 74-75). Findings of Fact and Conclusions of Law were also filed on April 30, 1965 (T. 69-73). This appeal followed.

STATUTES AND REGULATIONS INVOLVED

1. Title 49, U.S.C.A., Sec. 1301

(14) "Civil Aircraft" means any aircraft other than a public aircraft;

(30) "Public Aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any state, territory, or possession of the United States or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

2. Civil Air Regulation 45.2, 14 CFR 45.2 (Revised as of January 1, 1963) reads in pertinent part:

No person subject to the provisions of this part [covering Commercial Operator Certification and Operation Rules] shall engage in air commerce using aircraft of more than 12,500 pounds maximum certificated take-off weight until he has obtained from the Administrator a commercial operator certificate.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that Aircraft B-377PG was a public aircraft (T. 73, line 6).

2. The District Court erred in holding that appellee, as owner of aircraft B-377PG, was not required under the Federal Aviation Act, or any regulation thereunder of the Federal Aviation Administrator, to hold a Commercial Operator Certificate (T. 73, lines 12-15)

3. The District Court erred in finding that, by reason of the provisions of the Grant of Exemption, the Certificate of Airworthiness, the Restricted Operating Limitations, the contracts with NASA, and the use to which aircraft B-377PG was required to be put, said aircraft was at the time here material used exclusively in the service of the United States Government (T. 72, lines 19-24).

QUESTION PRESENTED

Whether an aircraft, privately owned and operated as a commercial venture, becomes a "public aircraft" within the meaning of 49 U.S.C.A. 1301 (30) because of a contract for its use by a government agency.

ARGUMENT

Summary of the Argument

In enacting the Federal Aviation Act of 1958, Congress created the Federal Aviation Agency for the purpose of prescribing uniform rules and regulations for the use of navigable air space for all users -- civil and military. It also authorized the Administrator of that agency to prescribe minimum rules and regulations and standards of safety for civil aircraft.

The Act defines a third category of aircraft, i.e. "public aircraft", but does not purport to give the Federal Aviation Agency, or any other agency, jurisdiction over such an aircraft or its operator.

The appellee, owner and operator of Boeing B-377PG, entered into two "Air Transportation Services" contracts with NASA wherein appellee was to furnish the aircraft, flight crews, other necessary personnel and insurance for the purpose of transporting materials for NASA.

From these contracts and the use to which the aircraft was put, the District Court ruled that the aircraft was a "public aircraft", and therefore, the appellee was not subject to the regulatory control of the Federal Aviation Administrator.

Appellant contends herein that the District Court's ruling is in error, since Congress did not intend that an aircraft privately owned and operated as a commercial venture be classified as a "public aircraft" merely because it is under contract to

a government agency.

Congress gave the Federal Aviation Agency and its Admini- power to regulate and control "civil aircraft." To say that the contracts between appellee and NASA converted an otherwise "civil aircraft" into a "public aircraft" is to allow one government agency to contract away the powers and duties given by Congress to another agency.

Even if one agency could, by contract, establish an aircraft as being a "public aircraft", the contracts involved herein do not show such an intent by NASA. In return for its services, appellee was to receive an estimated contract price of $995,884.00 from NASA. From the contracts, it can be seen that appellee was engaged in a commercial venture and that NASA did not consider the aircraft as being other than a "civil aircraft" subject to the Federal Aviation Act of 1958.

I

A GOVERNMENT AGENCY CANNOT, BY CONTRACT, ESTABLISH THE STATUS OF A PRIVATELY-OWNED AIRCRAFT AS BEING EITHER A PUBLIC OR CIVIL AIRCRAFT.

The District Court held that aircraft B-377PG was a "public aircraft" after finding (T. 72, lines 19-24) that "By reason of the provisions of . . . the contracts with NASA and the use to which aircraft B-377PG was required to be put, said

aircraft was at the times here material used exclusively in the service of the United States Government."

If we follow this reasoning, then we have the anomalous situation of one government agency contracting-away the powers and duties given by Congress to another agency. It is certainly apparent that if the same contracts (T. 64 and 67) were entered into between appellee and another corporation or individual, the aircraft here in question would be a civil aircraft. But, because the other contracting party is a government agency, the court has concluded that this is not a civil aircraft and therefore the appellee was not required to obtain Part 45 Certification and was not subject to all of the safety and operating provisions of the Federal Aviation Act of 1958, as amended, nor to the rules and regulations of the Administrator.

The legislative history of the Federal Aviation Act of 1958, as amended, shows that Congress intended to create one Federal agency which would prescribe uniform rules and regulations for the use of the navigable air space. The Committee on Interstate and Foreign Commerce in its House Report No. 2360, Vol. II, U.S. Code Congressional and Administrative News, p. 3741 (85th Cong., 2nd Sess. 1958), stated:

> "Clearly an agency is needed now to develop a sound national policy regarding use of navigable air space by all users -- civil and military. This agency must combine under one independent administrative head functions in that field now exercised by the

President, the Department of the Defense, the Department of Commerce, and the Civil Aeronautics Board." (at page 3744)

In commenting upon the scope of the duties of the Administrator of the Federal Aviation Act, the legislative history, at p. 3756, supra, states:

> ". . . the authority of the Administrator under this title (Title VI -- Safety Regulations of Civil Aeronautics) with respect to prescribing minimum rules and regulations and standards of safety is expressly limited to civil aircraft. For this reason, section 601(a)(7) of the existing law (relating to the authority of the Administrator to prescribe air-traffic rules) has been omitted from this title and such authority is now contained in section 307(c) of Title III of the Committee Amendment and applies to both civil and military aircraft." (Parenthesis added)

The airplane here is not a military plane, and if it is not a civil aircraft either, then it is not subject to the Federal Aviation Agency Administrator's rules regarding standards of safety and air traffic.

One of the regulations established by the Administrator of the Federal Aviation Agency for larger civil aircraft is that the operator of said aircraft must obtain a Commercial Operator's Certificate under Part 45 of the Civil Air Regulations. It is the

failure of the appellee to obtain this certificate before flying the aircraft that is the basis for this action. Therefore, we will attempt to analyze the requirements and necessity for this certificate.

Subsection 2 of Part 45, requires the certification of the civil aircraft operator "using aircraft of more than 12, 500 pounds maximum certificated take-off weight." All operators subject to the provisions of Part 45 are then subject, among other things, to the following regulations:

> Part 45. 10 -- An authorized representative of the Administrator shall be permitted at any time and place to make inspections or examinations (including inspections and examinations of financial books and records) to determine an operator's compliance with the requirements of the Federal Aviation Act of 1958, as amended, the Civil Air Regulations, the provisions of the operator's operating certificate, and the operations specifications, or to determine the operator's eligibility to continue to hold a certificate.
>
> Part 45. 11 -- (a) except as provided in paragraph (b) of this section (relating to common carriers), all persons subject to the provisions of this part shall, in the conduct of operations subject hereto, comply with the operating requirements of Part 42 of this subchapter as heretofore or hereafter amended. Operating requirements shall be deemed

to include requirements relating to aircraft and equipment, maintenance, flight crew, flight time limitations, flight operation, aircraft operating limitations, and related record-keeping and reporting requirements. (Parenthesis added)

Therefore, certification under Part 45 gives the Administrator authority to inspect the facilities of an operator of an aircraft with more than 12,500 pounds maximum certificated take-off weight if that operator is not already subject to the rules relating to common carriers, and to determine whether the operator has complied with all the minimum standards of safety prescribed by the Administrator. Since the appellee is not a common carrier, the only way it becomes subject to this control by the Administrator is through the issuance of the Part 45 certification.

The legislative history of the Federal Aviation Act of 1958, p. 3741, supra, shows that the purpose of the Act is "to establish a new Federal agency with powers adequate to enable it to provide for a safe and efficient use of the navigable air space by both civil and military operations." Clearly, Congress wanted to establish an agency which would develop comprehensive rules regulating all flight, but if we are to allow appellee's argument that this is a "public" aircraft then the operator of that aircraft does not have to conform to those rules and regulations laid down by the Administrator for the safe and efficient use of the navigable air space.

If the operator of an aircraft the size of the one involved herein is to be excepted from compliance with the requirements of the Federal Aviation Act of 1958, as amended, and the rules, regulations and standards of safety prescribed by the Administrator, something more than the entering into of an "Air Transportation Services" contract with a government agency should be required. Since the contract does not undertake to specify all the rules and regulations that will apply to the operator, and the aircraft is not a military plane under the jurisdiction of the Department of War, what set of rules are to apply to the operator of the aircraft if the Federal Aviation Act does not apply?

It would be contrary to the express intent of Congress in enacting the Federal Aviation Act for the purpose of creating a "sound national policy regarding use of navigable air space by all users" to say that a government agency that enters into a contract with a private corporation for the use of an aircraft has thereby converted that airplane into a "public aircraft" and relieved the owner thereof of complying with the regulations and standards of safety prescribed by the FAA Administrator.

II

ASSUMING, IN ARGUENDO, THAT A PUBLIC AGENCY COULD ESTABLISH THE STATUS OF AN AIRCRAFT BY CONTRACTING WITH A PRIVATE CORPORATION, THE CONTRACTS HERE DO NOT SHOW SUCH AN INTENT BY NASA.

In the initial contract entered into between appellee and NASA on May 28, 1963 (T. 64), there are numerous provisions to show that NASA considered the airplane to be a civil aircraft. The pertinent clauses in the contract are as follows:

1. On the first page of the contract, it states that the contract is for "Air Transportation Services."

2. Article IV, page 4 - Flight Operations, Subsection B, provides:

> "Contractor shall submit no later than midnight Thursday of each week a plan of operational movements for the next succeeding week until the aircraft has been formally certificated by the Federal Aviation Authority (FAA) .... After FAA certification, all movements of the aircraft shall be authorized by the Contracting Officer on a trip by trip basis."

Since the certification of an aircraft is required of civil aircraft only under Part 42 of the Civil Air Regulations, this provision would be unnecessary if NASA considered the airplane to be a public aircraft.

3. Article V, page 5 - Performance Requirements

and Payment, Subsection B:

"Contractor shall put forth his best effort to obtain formal FAA certification of this aircraft by June 27, 1963. A copy of the FAA certification will be furnished the Contracting Officer on or before June 27, 1963. In the event the contractor has not obtained the FAA certification of airworthiness for this aircraft by June 27, 1963, the period of performance of this contract shall automatically be extended by a number of days equal to the days of delay beyond June 27, 1963. In no event, however, shall the term of this contract extend beyond August 31, 1963."

Again, this is a provision relating to certification of the aircraft by the FAA, which certification would not be required of a public aircraft.

4. Article IX, page 6 - Maintenance, Subsection B:

"Necessary maintenance including preventive maintenance will be accomplished by properly FAA qualified maintenance personnel in strict accordance with the FAA Air Carriers' Approved Maintenance Program."

The FAA Air Carrier Approved Maintenance Program applies to civil aircraft only.

5. Article XII, page 7 - Safety Standards:

"The contractor shall be solely responsible

for compliance with all safety standards and the level of maintenance and repair required to meet the safety standards prescribed by applicable FAA/CAB Regulations; provided, however, that the Contracting Officer shall have authority to direct additional measures if such is necessary in his opinion to assure safety of the aircraft passengers or cargo." (Emphasis added)

As discussed in paragraph I, supra, it is the obtaining of a commercial operator's certificate under Part 45 of the Civil Air Regulations that brings the operator of an aircraft under the supervision of the Administrator of the Federal Aviation Agency as to safety standards. The safety standards prescribed by the applicable Federal Aviation Agency regulations apply only to civil aircraft and therefore, would not be applicable if this were a public aircraft.

6. Article XIV, page 7 - Compliance with Applicable Laws:

"The contractor shall procure all necessary permits and licenses; obey and abide by all applicable laws, regulations and ordinances and all other rules of the United States of America, and of the state wherein the services are performed, or any other duly constituted public authority. . . ."

If NASA considered this aircraft to be a public aircraft the provision here relating to "necessary permits and licenses" and

to "regulations" would be unnecessary since no permits or licenses are prescribed for public aircraft nor are there any regulations relating to them.

In view of the foregoing provisions in the initial contract, it is clear that NASA did not consider this aircraft to be anything but a civil aircraft.

It should be noted that by the time the second contract was entered into between NASA and appellee (T. 67) the appellee had secured certification of the aircraft under Part 42 of Civil Air Regulations as required of civil aircraft (T. 65) and was continuing to process its application for a Part 45 Commercial Operator Certificate. This application for a Part 45 certificate was never withdrawn by defendant and NASA intended that Aero Spacelines, Inc., obtained this certificate as an operator of a civil aircraft, as it clearly indicated by the contract entered into September 6, 1963 (T. 67).

As to this latter contract, it is conceded that Article I provides that defendant is to "furnish to the Government for its exclusive use and control one each B-377 PG aircraft, Serial No. N1024V." But, in the remaining articles, there are numerous provisions to indicate that NASA did not intend nor did it, in fact create a public aircraft by this contract, as is shown by the following provisions of the contract:

1. The first page of the Contract states that it is a contract for "air transportation services," thus, indicating something different from a contract

for the use of an aircraft only.

2. Paragraph C of Article V gives the Government "the right to utilize this aircraft for additional miles not to exceed 16,000 miles per month for a total of 23,000 per month during the term of this contract."

Such a provision, which is essentially an option to NASA, would appear unnecessary if the aircraft by contract was "exclusively used" by NASA.

3. Although Article IV provides that all movements of the aircraft shall be at the direction of the Contracting Officer, it also provides that the defendant shall furnish the aircraft "within 48 hours after receipt of notice from the Contracting Officer." Furthermore, Article VII provides that if the Contractor "fails to respond to a trip requested by the Contracting Officer within the time allowed in Article IV," the minimum guaranteed mileage per month is thereby reduced by estimated mileage of the trip requested. (Emphasis added)

Again, these provisions would appear unnecessary if NASA truly had exclusive use of the aircraft at all times.

4. Although Article IV states that all movements of the aircraft shall be at the direction of the Contracting Officer, it is obvious from Article I and Article II (C) that the responsibility for the flight

operations actually rests with the contractor. Furthermore, Article IX places the entire responsibility upon Aero Spacelines, Inc. to perform maintenance "in strict accordance with the FAA approved Maintenance Manual."

5. Article XIII of the contract places the sole responsibility upon Aero Spacelines to comply with all safety standards prescribed by the applicable FAA/CAB regulations.

Since the FAA standards of safety are limited to civil aircraft only, this provision would be unnecessary if NASA really intended this aircraft to be a public aircraft.

6. Aero Spacelines, Inc., by Article XV, is required to obtain all the necessary permits and licenses as well as to comply with all applicable laws of the United States and of any state.

7. By virtue of Article I, Aero Spacelines, Inc. is an independent contractor and not an agent of the Government and by Article XV all employees of the contractor assigned to perform the work of the contract are to be considered employees of the contractor at all times and not of the government.

8. Article XII requires Aero Spacelines to obtain passenger-public liability and property damage insurance; Article XVI provides that the contractor will hold the government harmless from any and all

claims arising from or incident to the work of the contract; and Article XVII provides that Aero Spacelines shall be liable for injury or damage "to personnel or cargo carried under this contract."

9. Article II (E) requires that Aero Spacelines produce, among other items, "FAA manuals which cover certification of the aircraft", and "performance data as submitted for aircraft certification."

In the contract, such provisions as Article IX (B) requiring that the aircraft be maintained in strict accordance with the "FAA approved maintenance program" indicates that the aircraft was considered to be a civil aircraft since, if it was not a civil aircraft, the FAA maintenance program would not be applicable.

If it were the intention of NASA to use the aircraft as a public aircraft, it would be unnecessary for NASA to have required that Aero Spacelines, Inc. obtain liability and property damage insurance or to place responsibility upon Aero Spacelines, Inc. for injury or damage to "personnel or cargo carried under the contract" (Article XVII) because the government is by long-standing policy a self-insurer.

Despite the use of the term "exclusive use" in Article I, it does not appear from other provisions in the contract that NASA legally had exclusive use of the aircraft. For example, assume that in any given month NASA found use for the aircraft for the minimum number of miles of 7,000, which would constitute 1-1/2

round trips from Los Angeles to Cape Kennedy. In such a situation, assuming that it would take two days to load the aircraft in Los Angeles, one day enroute and one day ground time at Cape Kennedy for turn-around, the entire 7,000 mile minimum guaranteed portion of the contract could be performed within approximately eight days. Thus, Aero Spacelines conceivably would be free to "use" the aircraft during the remaining 22 or so days of the month, so long as NASA did not exercise its option for any of the additional 16,000 miles. Assuming further, however, that NASA exercised its option in the contract (Article V (C)) to use the aircraft for an additional 16,000 miles in any given month, the contract could be completely performed with an estimated 24 or 25 days in that month and, again, used by Aero Spacelines for other contractual operations during that month. Despite the requirements that all movements of the aircraft must be at the direction of the Contracting Officer, it would seem that the "48-hour notice" to furnish the aircraft, coupled with the penalty for failure to "respond to a trip" (Article VII), indicates that Aero Spacelines might use the aircraft for any other purpose at any time so long as it could meet the 48-hour notice requirement or suffer the reduction in its guaranteed mileage. Certainly it is possible that the appellee could obtain such a good offer for some other use of the aircraft that it would be financially advantageous for it to ignore the requirement that all movements of the aircraft must be at the direction of the Contracting Officer and accept the penalty of a reduction in the guarantee payment.

III

CONGRESS INTENDED THE TERM "CIVIL AIRCRAFT" TO APPLY TO AN AIRCRAFT USED FOR COMMERCIAL PURPOSES OF THE OPERATOR.

The statutory definition of a phrase should not be construed in such a mechanical fashion as to defeat a major purpose of the statute.

Lawson v. Swannee Fruit & S.S. Co., et al,
336 U.S. 198;
Case v. Bowles, 327 U.S. 92;
United States v. Kurzenknabe, 136 F. Supp. 17.

The definition of "public aircraft" is one which is used exclusively in the services of any government, "but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes." 49 U.S.C.A. 1301 (30) (Emphasis added).

Specific provision was, therefore, made for the exact opposite factual situation than is involved herein, i.e. a government-owned aircraft that is leased (or otherwise used) in a commercial venture. Certainly if the government leased one of its planes to a private corporation for the carrying of goods and received a remuneration therefor, the aircraft would fall within the above-quoted exception to the definition of "public aircraft" and the private lessee-operator would be required to obtain a Commercial Operator's Certificate.

Although no express exception was made by Congress for the situation involved herein, i. e. where the government contracts for the non-military, non-emergency use of an airplane with a private corporation, it must be remembered that this is the first such contract and, even though this aircraft is used by the government, this use is for commercial purposes as far as the appellee- operator is concerned (as is amply demonstrated by the amount of the consideration provided by the contracts) (T. 64 and 67).

Since Congress has defined "public aircraft" in terms of the use to which the aircraft is put, it does not seem logical to say that a government-owned aircraft under the same contract to a private corporation would be a civil aircraft while this one is a public aircraft because it is engaged by a government agency. This type of approach would ignore the fact that as to the appellee-operator the primary use of the aircraft is for commercial purposes.

Although no direct explanation or interpretation of the terms "public aircraft" or "civil aircraft" could be found in the federal statutes, the following definitions used in international treaties and agreements provide some insight into Congress' use of the terms:

THE BASES AGREEMENT, 1948, between the United States, United Kingdom and Northern Ireland (62 Stat. (2) 1860).

Article XIV -- "Civil Aircraft" means

aircraft other than those used in military, customs or police services.

CONVENTION ON INTERNATIONAL CIVIL AVIATION (THE CHICAGO CONVENTION, 1946, signed by the U. S. in 1944), Department of State Publication No. 2282.

Article 3 -- (a) This convention shall be applicable only to civil aircraft and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs, and police service shall be deemed to be state aircraft.

Although "public aircraft" was not used, the term "civil aircraft" was specifically defined in The Bases Agreement, supra, as being aircraft other than those used in military, customs, or police service. Since this agreement had to be ratified by the United States Senate, this definition cannot be ignored. Certainly, if Congress employed the same term in enacting federal laws, it must have intended the same or a similar definition to apply and, under that definition, the aircraft herein would be a civil aircraft, since it is not "used in military, customs, or police services." (That NASA is not a military organization is shown by the legislative history of the National Aeronautics and Space Act of 1958, U. S. Code and Admin. News, 85th Cong. 2nd Sess., 1958, page 3160, at 3166).

Since the definitions of "public aircraft" and "civil aircraft" revolve around the use of the aircraft, an aircraft used exclusively by the government is a public aircraft only if that use is not for commercial purposes. If it is for commercial purposes of the operator, then it must be a civil aircraft. The soundness of this interpretation is more apparent when the definition of "civil aircraft" in the Bases Agreement is considered, since that definition also looks to the use of an aircraft and impliedly includes all aircraft used for commercial purposes.

CONCLUSION

When the ultimate finding, as in the instant case, is a conclusion of law, or at least a determination of a mixed question of law and fact, on review, the Court of Appeals may substitute its judgment for that of the trial court. Bogardus v. Commissioner, 302 U.S. 34, 39; United States v. Anderson, 108 F. 2d 475, 478, 479 (7th Cir. 1939), and in either case the Court of Appeals may reverse with a direction to find for the appellant.

For the reasons stated herein, it is respectfully submitted that the District Court's judgment in favor of appellee

be reversed, and the cause remanded with instructions to enter judgment for the appellant.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Carolyn M. Reynolds
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